IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 3 OF 2002.

Mr. J.J. Rodrigues,
86 years, r/o Rodrigues
Manor, H. No. 248,
Chicalim. ... Applicant.

Versus

1. Mr. Ashok Yeshu
Sankwalkar, r/o H.No. 168,
Penta, Chicalim.
2. State (through P.P.) ... Respondents.

Mr. S.G. Bhobe, Advocate for the Applicant.

Mr. E.O. Mendes, Advocate for the Respondent No. 1.

Coram: P.V. HARDAS, J.

Date: 1st March 2002.

ORAL JUDGMENT.

By consent of parties, this Criminal Revision Application is taken up for final hearing.

2. The applicant/original accused has filed the present Criminal Revision Application challenging the Order passed by the learned Judicial Magistrate First Class, Vasco, dated 2nd January 2002, in Criminal Case No. 188/P/99/D rejecting the application for recall of process filed by the present applicant/accused.

3. On the basis of the complaint, which was filed by the present respondent no. 1, the learned Judicial Magistrate First Class, after examining the complainant and the other witnesses, by his Order dated 18th June 2001, had

issued process against the applicant/accused for an offence punishable under Sections 403, 409 and 477A read with Section 511 of the Indian Penal Code. On receipt of the summons from the learned Judicial Magistrate First Class, Vasco, the applicant/accused filed an application before the learned trial Court for recall of the process. The said application came to be rejected by the Judicial Magistrate First Class, Vasco. Hence the present revision.

4. Mr. Bhobe, the learned counsel appearing for the applicant, placing reliance on the Judgment of the Supreme Court in **S.W. Palanitkar and others v. State of Bihar and another,** (2002) 1 S.C.C. 241, has urged before me that unless and until the material so placed by the complainant before the Judicial Magistrate First Class discloses a dishonest intention on the part of the applicant/accused, a process either under Sections 403, 405 or 409 cannot be issued against the applicant/accused. In support of his contention, the learned counsel has urged before me that the present applicant/accused had opened an account in the Bank at Chicalim and the said account had not been opened by him in his personal name but was opened in his capacity as the Attorney of the Comunidade. Thus, according to him, at the very inception there is anabsence of dishonest intention and subsequently the entire amount, which had been deposited by the applicant/accused, had been refunded to the Comunidade. Thus, according to him, there is neither any wrongful loss

caused to the Comunidade nor any wrongful gain to the applicant/accused. It is next urged by the learned counsel for the applicant/accused that Section 477A of the Indian Penal Code would not apply. According to the learned counsel for the applicant/accused, it would be a traversity of justice if the present proceedings are allowed to continue before the Judicial Magistrate First Class as the said proceedings had been filed with the intention to wreak vengeance against the applicant/accused, who was earlier the Attorney of the Comunidade. The complaint has been filed by the respondent no. 1, who is also an Attorney elected subsequent to the applicant/accused.

5. Mr. Mendes, the learned counsel appearing for the non-applicant/complainant, has urged before me that the Order of issuance of process has to be judged on the touchstone of the availability of material at the time of issuance of process before the learned Magistrate. According to him, if the complaint, the accompanying documents and the depositions of the witnesses, prima facie, establish the commission of the offence, the issuance of process is justified. According to him, the test for determination of prima facie material is not whether the material so taken is sufficient for conviction, but raises suspicion against the accused.

6. A perusal of the allegations in the complaint

would show that the applicant/accused was not concerned with the operation of the account of the Comunidade. Paragraph 3 of the complaint states:-

> " Under the Code of Comunidades all monies in the name of Comunidade are held by the Treasurer of the Comunidade who is known as (the key-holder) of the Comunidade. The accounts of the Comunidade are operated by the President, Treasurer and the Escrivao (Clerk). The attorney of the Comunidade has no authority to handle the cash/the monies of the Comunidade."

7. It is next averred in the complaint that the applicant/accused had clandestinely opened a saving bank account with the Indian Bank Chicalim in his personal name. Records and Proceedings have been called for by this Court and a perusal of the xerox copy of the pass book would reveal that the applicant/accused had opened an account in his personal name, though he styled himself as an Attorney of the Comunidade. The account is not opened in the name of the Comunidade. The account was opened in his personal name. The complaint further states that the money which the applicant/accused had deposited in this said account was the money of the Comunidade. It is true that the entries in the pass book do not show that the applicant/accused had withdrawn the amounts. Merely because of non-withdrawal of the money, it cannot be said that the applicant/accused has not caused wrongful loss to the Comunidade or wrongful gain to himself. Money was deposited by the applicant/accused in his personal account. The money on the basis of the

evidence, admittedly, belonged to the Comunidade. Thus, the money deposited in the personal account of the applicant/accused has caused wrongful loss to the Comunidade. Since the money was deposited in the personal account of the applicant/accused, the money was always at the disposal of the applicant/accused and could be withdrawn by him at any time. Therefore, the submission that the money was not withdrawn by the applicant/accused is completely ill-founded.

8. Coming to the dishonest intention on the part of the applicant/accused, it is seen that the applicant/accused had opened an account in his own name, though, he styled himself as Attorney of the Comunidade. The amounts had not been deposited merely on the basis that there was no account existing in the name of the Comunidade. At least, it has not been urged before me that the opening of the account by the applicant/accused in his own name was either communicated to or that approval was sought for opening the account in his own name and what is most striking is that the Bank had informed the complainant on 21st December 1999 that the amount of Rs. 52,893/- was transferred to the account of the Comunidade. Meanwhile, the General Body of the Comunidade of Chicalim had taken up the matter in their meeting, which was held on 30th November 1997, and the Administrator of the Comunidade by his notice dated 16th January 1998 had called upon the applicant/accused to show

cause as to why action should not be initiated against him for criminal misappropriation and for breach of trust. It is also stated in paragraph 8 of the complaint that the complainant had addressed a letter on 17th December 1999 to the Vasco Police Station, which letter was received by the Vasco Police Station on 18th December 1999. Thus, it would appear that after the complainant had reported the matter to the police that the applicant/accused informed his Banker to transfer the amount of Rs. 52,893/- to the account of the Comunidade. Thus, the dishonest intention on the part of the applicant/accused is writ large on the facts of the case. According to the learned counsel appearing for the applicant/accused, the said amount was transferred on the basis of a statement recorded before the Collector dated 17th December 1999. Be that as it may, the applicant/accused had domain over and had retained the entire amount for a considerable length of time without any justifiable reason. The dishonest intention for all these reasons is writ large.

9. In the result I do not find any substance in this Criminal Revision Application, which is filed by the applicant/accused. However, taking into consideration that the applicant/accused is 86 years of age, a direction is necessary to be issued to the Judicial Magistrate First Class for expeditious disposal of this case.

10. Criminal Revision Application is, therefore dismissed with no order as to costs. However, the learned Judicial Magistrate First Class, Vasco, is directed to expeditiously decide the trial and in no case later than four months from receipt of the writ of this Court. Both the counsel assure me that they would co-operate with the Judicial Magistrate First Class, Vasco, in the expeditious disposal of the case. The records and proceedings be remitted to the trial Court. The parties to appear before the Judicial Magistrate First Class, Vasco on 15th March 2002. Any observations made by me touching the merit of the case shall be ignored by the trial Court while deciding the case on merits.

(P.V. HARDAS)
JUDGE.

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